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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978 No. 78-661

ALFRED A. PORRO, JR. AND THOMAS JONES, *Petitioners*

v.

STATE OF NEW JERSEY, *Respondent*

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE AND JOHN MARSHALL SOCIETY OF THE FAIRLEIGH DICKINSON UNIVERSITY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY

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TABLE OF CONTENTS

	Page
I. Interest of Amici Curiae	1
II. Statement of the Case	3
III. Argument	4
IV. Conclusion	9

TABLE OF CITATIONS

Alexander v. Louisiana, 405 U.S. 625 (1972)	4
Arnold v. North Carolina, 376 U.S. 773 (1964)	4
Avery v. Georgia, 345 U.S. 559 (1953)	4
Baldwin v. New York, 399 U.S. 66 (1970)	5
Burns v. Forsten, 410 U.S. 686 (1973)	5
Cassell v. Texas, 339 U.S. 282 (1950)	4
Castaneda v. Partida, 97 S. Ct. 1272 (1977)	4
Duncan v. Louisiana, 391 U.S. 145 (1968)	6
People v. Hoiland, 22 Cal. App.3d 530 (1970)	6
Roe v. Wade, 410 U.S. 113 (1973)	6
Smith v. Texas, 311 U.S. 128 (1940)	4

TABLE OF CITATIONS *(Continued)*

Cases:	Page
State v. Foster, 196 Nebr. 332, 242 N.W. 2d 876 (1976)	5
Taylor v. Louisiana, 419 U.S. 522 (1975)	4, 6, 7
Thiel v. Southern Pacific Co., 328 U.S. 217 (1946)	4, 5
Turner v. Fouche, 396 U.S. 346 (1970)	4
United States v. Allen, 445 F.2d 849 (5th Cir. 1971)	5
United States v. Butera, 420 F.2d 564 (1st Cir. 1970)	5
United States v. Guzman, 377 F. Supp. 140 (S.D. N.Y. 1972), aff'd., 468 F.2d 1245 (2d Cir. 1972)	5
United States v. Kuhn, 441 F.2d 179 (5th Cir. 1971)	5
Whitus v. Georgia, 385 U.S. 545 (1967)	4

Other Authorities:

Kairys, Kadane & Lehoczky, Jury Representativeness: A Mandate for Multiple Source Lists, 65 Calif. L. Rev. 776, 780-88 (1977)	7

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BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE AND JOHN MARSHALL SOCIETY OF THE FAIRLEIGH DICKINSON UNIVERSITY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY

I. Interest of Amici Curiae

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia nonprofit corporation whose membership is comprised of more than 1,600 lawyers who are citizens of every State and all of whom are primarily engaged in positions bringing them into daily contact with the criminal justice system, as advocates, law professors or judges of the state and federal courts. Among NACDL's stated objectives is to promote the proper administration of criminal justice and to thereby concern itself with the protection of individual rights and

the improvement of the criminal law, its practices and procedures. NACDL tenders this brief in the discharge of that organizational objective. NACDL believes that the jury system is the wellspring of justice. Therefore, the automatic exclusion of students from jury service in the instant case not only works a form of arbitrary discrimination but also depletes justice itself.

The National Emergency Civil Liberties Committee (NECLC) is a national membership organization founded in 1951 to support the Bill of Rights and extend its protections to all citizens. NECLC has devoted considerable resources to protection of the rights of minorities, including students, and to problems of discrimination and unequal representation in jury selection. NECLC is committed to the constitutional mandate that jury systems be representative of a cross-section of the community.

The John Marshall Society at the Fairleigh Dickinson University is a student group devoted to the study and understanding of political science and committed to student participation in all aspects of society, including service as jurors.

Letters from counsel for Petitioners and Respondent consenting to the filing of this *amici curiae* brief have been filed with the Clerk of the Court.

II. Statement of the Case

Amici are submitting this brief urging the Court to review the instant case because we believe the issues raised have an immediate importance that goes beyond the rights of the particular litigants. Jury selection officials in Bergen County, New Jersey have excluded students from the jury pool, thereby undermining the representativeness of the jury and denying to students a right and responsibility of citizenship. *Amici* urge the Court to review this case, to re-examine the standards for determining cognizability in jury selection challenges, and to prohibit exclusion of students.

III. Argument

This Court has ruled since the 1940's that jury systems must be representative of a cross-section of the community. *Castaneda v. Partida*, 97 S.Ct. 1272 (1977); *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Turner v. Fouche*, 396 U.S. 346 (1970); *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Avery v. Georgia*, 345 U.S. 559 (1953); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946); *Smith v. Texas*, 311 U.S. 128 (1940).

Two lines of cases have flowed from this principle. First, "systematic" or "intentional" discrimination by selection officials renders a jury system presumptively invalid regardless of the purpose or the existence of actual prejudice. *E.g., Taylor v. Louisiana, Arnold v. North Carolina, Avery v. Georgia*, all *supra; Cassell v. Texas*, 339 U.S. 282 (1950). Second, a "significant" or "substantial" disparity creates an inference of "systematic" or "intentional" discrimination which is not defeated by a nondiscriminatory purpose or lack of actual prejudice. *E.g., Castaneda v. Partida, Taylor v. Louisiana, Alexander v. Louisiana, Turner v. Fouche*, all *supra; Whitus v. Georgia*, 385 U.S. 545 (1967).

In this case, the exclusion of students clearly falls in the intentional exclusion line of cases, and the primary question is whether the intentional, total exclusion of students from a state jury pool violates the Constitution.

As a matter of sound principle as well as practicality, the Constitution should not be read to prohibit exclusion or serious underrepresentation of every group in the community. This Court has repeatedly held that only certain groups are "cognizable" in this regard. However, the standards for distinguishing cognizable groups from other groups are not clear or consistent and have not been fashioned with attention to the policies underlying the representativeness principle.

In *Thiel v. Southern Pacific Co.*, 328 U.S. 212, 220 (1946), where the representativeness principle was first elaborated, the Court set out the following broad categories of cognizability: "economic, social, religious, racial, political, and geographical groups in the community." Justice Frankfurter, dissenting, said the following are relevant: whether the persons in the group "have a difference outlook psychologically and economically," whether they "adopt a different social outlook," and whether they "have a different sense of justice and a different concept of a juror's responsibility." 328 U.S. at 230.

Since *Thiel*, the Court has not provided significantly more concrete guidance, and as a result, the standards applied by and the results in the lower federal and state courts are quite inconsistent. For example, *compare United States v. Butera*, 420 F.2d 564 (1st Cir. 1970) *with United States v. Allen*, 445 F.2d 849 (5th Cir. 1971). Most courts have focused on whether the group can be functionally defined and limited, whether there is group cohesion, whether the group has a demonstrably different social or judicial outlook, and the size of the group. E.g., *United States v. Kuhn*, 441 F.2d 179 (5th Cir. 1971); *United States v. Guzman*, 337 F.Supp. 140 (S.D.N.Y. 1972), *aff'd.*, 468 F.2d 1245 (2d Cir. 1972); *State v. Foster*, 196 Nebr. 332, 242 N.W.2d 876 (1976).

Amici believe this focus is misplaced. It has led courts to base their rulings on, for example, whether a precise age can be set as the dividing line between young and older people rather than determining the significance of serious underrepresentation of young people in terms of the representativeness principle.[1]

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1. In determining an appropriate dividing line, available expertise should be used to draw as accurate a line as possible, which this Court has done in other contexts. See *Baldwin v. New York*, 399 U.S. 66 (1970) (setting six months as the maximum allowable penalty for nonjury trials); *Burns v. Forsten*, 410 U.S. 686 (1973)

See, e.g., *United States v. Allen*, *United States v. Kuhn*, both *supra*; *People v. Hoiland*, 22 Cal. App.3d 530 (1970). Similarly, consideration of group cohesiveness, demonstrably differentiable outlook and size, though sometimes relevant, should not be determinative as to some groups. Exclusion or serious underrepresentation of people of eastern European ancestry or nonwhites clearly should be ruled unconstitutional, yet in many areas of the country these groups are not cohesive, do not have a different outlook, and/or constitute only a small portion of the population.

To determine which groups jury pools should be representative of, one should look at the reasons why jury pools must be representative; appropriate standards of cognizability should be based on the policies underlying the representativeness principle. Viewed this way, considerations such as precise defineability, cohesiveness, outlook and size will be relevant, but other factors will, in some cases, be primary.

The representativeness principle furthers three important societal purposes. First, litigants should be guaranteed impartiality and integrity—basically, fairness—in jury determinations. Second, direct citizen participation in the judicial process, an aspect of democratic and representative government, is inconsistent with basic democratic principles unless it is cross-sectional or representative. Third, it is important not only that the jury system be fair and democratic but also that people generally can see and understand its fairness and democracy, which depends on its representativeness.[2] See *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duncan v. Louisiana*, 391 U.S. 145 (1968);

Note 1—*Continued*
(setting 50 days as the maximum allowable residency requirement for voting); *Roe v. Wade*, 410 U.S. 113 (1973) (setting the first trimester of pregnancy as the period in which a woman has a right to an abortion).

2. This third policy can be seen as following from the first two, but it is particularly important in the context of cognizability determinations.

Thiel, supra. See also Kairys, Kadane & Lehoczky, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 Calif.L.Rev. 776, 780-88 (1977).

These policies suggest that standards of cognizability should be framed in terms of fairness to litigants, democratic participation, and the legitimacy of the judicial process. Some groups strike at the heart of these policies because they have been historically excluded from democratic processes, their exclusion is basically offensive to contemporary notions of democracy and fairness, and/or they have a different outlook that should be represented. These would include groups based on race or ancestry, religion, economic or social status, sex, political or social beliefs and associations, and geography. Exclusion or serious underrepresentation of such groups is unfair to litigants, is inconsistent with democratic participation, and undermines the legitimacy of the judicial process.

Other groups not usually viewed as cognizable by the lower federal and state courts cannot be excluded from or seriously underrepresented on jury pools without basically contradicting these policies. Young people and students have been historically excluded from democratic processes. Through the political process, the society has recently decided to extend the rights to vote and serve on juries to persons 18 years old and over, which should be given considerable weight in determining cognizability. See *Taylor v. Louisiana*, 419 U.S. at 533. Young people and students have distinct attitudes that should be included to ensure the impartiality, integrity and fairness of jury determinations. Contemporary notions of democracy have led to their inclusion in the democratic and political process, and their exclusion from jury pools undermines the legitimacy of the judicial system. Moreover, with the possible exception of defineability as to young people,[3]

3. There is no problem of defining or limiting the group as to students.

the traditional factors are all present as to young people and students: there is cohesion, demonstrably different social and judicial attitudes, and considerable size.[4]

Throughout the world students are regarded as a significant social group and, often, an important political force. Our own recent history has demonstrated that students have distinct viewpoints that are strongly held. The Court should consider the social effect of a judicial pronouncement that approves of exclusion of students from an important societal function. Students are citizens in training to gain skills that will provide them with a useful position in society. Such a pronouncement alienates them from the institutions they will one day serve and promotes the feeling that the society does not take them or their citizenship seriously. Exclusion of students from jury service is inconsistent with contemporary notions of democracy and undermines the fairness and legitimacy of the judicial process.

4. The record indicates that about 10% of the eligible population are full-time students.

IV. Conclusion

The Court should review this case and re-examine the standards traditionally used to determine the cognizability of groups excluded or underrepresented in jury pools. The policies underlying the representativeness principle—fairness to litigants, democratic participation and the legitimacy of the judicial process—as well as traditional cognizability considerations—defineability, cohesion, distinct outlook and size—lead to the conclusions that students are a cognizable class and that their exclusion from a state jury pool is unconstitutional.

Respectfully submitted,

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